Nos. 661 and ~~771~~ 711.

In the Supreme Court of the United States

October Term, 1947.

A. PHILLIP RANDOLPH, *et al., Petitioners,*

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF

of petitioners Filed Under the Provisions of Section (a) Paragraph 4, Rule 38, of the Supreme Court of the United States.

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Nos. 661 and 771.

For convenience of reference, there is printed as an appendix the Findings of Fact and Conclusions of Law made and declared by the district court (Tr. 108-115).

I.

Respondents erroneously assume that the right established by the porters is one created or derived from the Railroad Labor Act, and that the act affords an administrative remedy for its violation.

Where Congress creates a right not theretofore existing and provides a remedy for its enforcement, it may be well enough to say that such remedy is exclusive. That is not this case.

The right established by the porters in this case is not a right granted by, nor is it in any way dependent upon, the Railroad Labor Act. This right, so established, existed before the act, was unmodified by the act, and exists today independently of the act. Such right is the common law right of a party to a contract for redress against one, not a party to the contract, who coerces the other contracting party to break the contract. Jurisdiction was not invoked as in a case arising under the laws and Constitution of the United States.

> "The jurisdiction of this Court is based alone by diversity of citizenship it has invoked nor based upon any contention by plaintiffs, nor does plaintiffs' petition disclose that it is a suit arising under the laws and Constitution of the United States." Declaration of Law 6, p. 115.

The wrong established, the sin against the common law, is the unlawful coercion of the carriers by the trainmen to cause the carriers to end their contract with the porters when the carriers, but for such coercion would continue operation under the contract with the resulting benefit to the porters. The act nowhere makes such conduct a violation of the act, nor does it provide a remedy for such common law tort. The illegality of such conduct springs

from the common law, not from the act. Jurisdiction to restrain such tortious conduct, irreparable injury being present, springs from fundamental jurisdiction of equity, not from any remedy created by the act. This being so, the hand of equity is not stayed until the porters exhaust an administrative remedy which in reality does not exist.

The situation is clearly illuminating by contrasting the Switchmen's case (320 U. S. 95), primarily relied upon by respondents, with the Steele (323 U. S. 192, 65 U. S. 226) and Tunstall (323 U. S. 210, 65 U. S. 234) cases. The Switchmen's case, by contrast, supports petitioner's application and is not in conflict with our contention.

The right in the one case (Switchmen's) was a right, not existing before, but created by the act which act which provided administrative procedure to protect and enforce such right. The right in the other cases (Steele and Tunstall) was essentially a common law right independent of the act. Fundamentally it was the right of a principal or beneficiary to demand that his agent or trustee should honestly and in good faith represent the rights and interests of those for whom he acts without hostile and unfair discrimination in favor of some and against others. The right of a principal or beneficiary to honest and fair representation was not created by the act. Such right was a fundamental common law right. It was the common law and not the act that imposed such obligation upon the bargaining agents and granted a corresponding right in those for whom the agency acted. In these two cases there was no controversy over the right of labor to organize and collectively bargain through agents of its own choosing. It was conceded that the Switchmen's Union was lawfully organized and conceded that it was the bargaining agent of the plaintiffs. It was the method of the union in bargaining that was in question, not the right of the union

representatives to bargain for plaintiffs. This was not so, however, in the Switchmen's case.

The right in the Switchmen's case was of labor to collectively bargain through representatives of its own choosing with corresponding obligation upon the employer to bargain in good faith with the employees. It was also a right of a majority of employees to bind nonconsenting minority. This was not a pre-existing right but one created by the act. Both the right to collectively bargain and the right of the majority to bind the minority *were created* by the act, *they did not exist at common law.* Congress having created such right, it was entirely appropriate for Congress to provide a procedure for protection and enforcement of the right so created, and this Congress did. The act provided, by specific procedure, protection and enforcement of the rights by it created under such conditions that it was entirely proper to hold that the remedy specified by Congress was exclusive.

Such holding is not in conflict with Steele and Tunstall nor with the district court in this case.

> "The act in Section 2, Fourth writes into the law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this act.' That 'right' is protected by Section 2, Ninth which gives the Mediation Board the power to resolve controveries concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. (Citing cases.) A review by the federal district courts of the board's determination is not necessary to preserve or protect that 'right.' Congress, for reasons of its own, decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top

of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, l. c. 301, 64 Sup. Ct. 95, l. c. 97.

The converse of the Switchmen's case is sound when the basis of that decision is considered, it is authority supporting the porters. Since the right here established is a common law right and did not spring from the act, since the act is silent as to such a situation, and since no administrative procedure is provided to right the common law wrong here committed, equity jurisdiction is not impaired. We submit no other conclusion can be drawn from the Switchmen's case.

Further contrasting the Steele and Tunstall cases with the Switchmen's case:

In the Steele and Tunstall cases, the act was the source of authority of the Switchmen's Union to represent and bargain for the craft, including Steele and Tunstall, and to bind a minority. The union representatives were accredited agents under the act. Those authorities and rights were not in question. It was the unlawful and discriminatory action of the bargaining agents in violation of their common law duty to Steele and Tunstall that constituted the cause of action against the union and its bargaining agents. Whether such conduct upon the part of the bargaining agents was lawful or unlawful depended upon application of general law, particularly the law governing the duties of a trustee to a beneficiary or agent to a principal. Such cause of action was not bottomed upon the Railroad Labor Act, nor any right granted thereby or administrative remedy based thereon. Hence it was

properly held that "the petitioner is without available administrative remedies, resort to which, when available, is prerequisite to equitable relief in the federal courts." (Tunstall case, 323 U. S., l. c. 214). That, in our judgment, is this case.

II.

The injunction against the carriers, particularly the preliminary injunction, was well within the jurisdiction of the court of equity incidental to and dependent upon the jurisdiction of the court to issue injunction against the trainmen.

Although the contract between the porters and the carriers is a contract at will, yet the porters have a legal right and interest in said contract. The right of the porters against the carriers under the contract is to place the carriers in a position of freedom in exercise of their judgment as to termination of contract without illegal interference, compulsion or coercion from others.

> "*Contracts terminable at will.* The fact that the contract is at will and terminable by either party at any time is of no consequence where neither party has attempted to revoke the contract and was not obliged to do so since each party to the contract has a manifest interest in the freedom of the other to exercise this judgment without illegal interference or compulsion." (32 C. J. 228.)

The proof, the court's finding and the carriers' answer, show without conflict that the carriers are content with the contract and desire it to continue and would continue it indefinitely if it were not for the coercion by the trainmen. (Finding VIII, p. 112; 476, 479, opinion lower court 640.)

Having issued this injunction against the trainmen restraining their coercion of the carriers, the court could

and should restrain the carriers from terminating the contract until the court could by its final injunction against the trainmen place the carriers in a position where they could exercise *their* free will and judgment as to terminating the contract, not merely reflect the will of the trainmen against the will of the carriers.

Once an equity court has jurisdiction of the subject matter and of the parties, it has full authority to grant and should grant full relief and to adjust in the one suit the rights and duties of all the parties which grow out of or are connected with the subject matter of the suit. While equity may not deny a legal right, yet it may restrain the exercise of such right for a reasonable time where the immediate exercise thereof would work unjust and irremediable harm to others. This is common practice in receivership and other heads of equity.

The carriers were proceeding to cancel the contract on June 30, 1946. The restraining order was issued June 24, 1946. Unless the court, temporarily at least, restrained the carriers, the carriers would have cancelled the contract and the entire status would have changed. It is entirely conceivable that a final injunction against the trainmen would be entirely unavailing if pending the litigation the carriers were not restrained.

Especially does a court of equity have broad discretion and sweeping authority to maintain the status quo *ante* until the final decree.

> "It is a well settled rule that a court of equity which has obtained jurisdiction of a controversy on any ground, or for any purpose, will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter, particularly with respect to the enforcement of its own decree, unless deprived of the

right to do so by statute; and this is true whether the question is of remedy or of distinct yet connected topics of dispute, and notwithstanding one of the parties declares that he does not ask affirmative relief but only wishes to be dismissed and left to enforce his rights in some other manner." (21 C. J., p. 134.)

"A court of equity ought to do justice completely, and not by halves; and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. *Camp* v. *Boyd*, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785, and cases cited." *McGowan* v. *Parish*, 237 U. S. 33, 35 Sup. Ct. 542, l. c. 548.

"That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. Pomeroy, Section 181, 231, *United States* v. *Union Pacific Railway Co.*, 160 U. S. 1, 52, 16 S. Ct. 190, 40 L. Ed. 319; *Camp* v. *Boyd*, 229 U S. 530, 551, 552, 33 S. Ct. 785, 57 L. Ed. 1317; *McGowan* v. *Parish*, 237 U. S. 285, 296, 35 S. Ct. 543, 59 L. Ed. 955; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 520, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Cf. Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 217, 218, 47 S. Ct. 357, 71 L. Ed. 612"; *Alexander* v. *Hillman*, 296 U. S. 222, 56 Sup. Ct., l. c. 211.

"Judgments in Equity.—The fundamental principle of equity in relation to judgments is, that the court shall determine and adjust the rights and liabilities concerning or connected with the subject matter of all the parties to the suit, and shall grant the particular remedy appropriate in amount and nature to each of those entitled to any relief, and against each of those who are liable, and finally shall so frame its decree as to bar all future claims of any party

before it which may arise from the subject matter, and which are within the scope of the present adjudication." 1 Pomeroy's Equity Jurisprudence, Fifth Edition, p. 154.

"The rule is well settled that the equity court having taken jurisdiction, full relief will be given between the parties. *Bureau of National Literature* v. *Sells, et al.*, D. C. 211 F. 379; *McGown* v. *Parish*, 237 U. S. 285, 35 S. Ct. 543, 59 L. Ed. 955; *Smith* v. *American National Bank*, 8 Cir., 89 F. 832, 839, 840; *Krohn* v. *Williamson, et al.*, v. *Monroe*, C. C. 101 F. 322; *Chicago, M. & St. P. Ry. Co. of Idaho* v. *United States*, 9 Cir., 218 F. 288." *Banco* v. *Boscana*, 100 Fed. (2d) 449, l. c. 452.

III.

Inability of Negro porters to obtain fair trial before the adjustment board on account of racial prejudice.

The trainmen say that the porters cannot raise this question because the trainmen did not resort to the Adjustment Board but submitted nothing thereto for hearing and decision (Trainmen's brief in opposition, page 34). Manifestly, such position is not tenable. The porters say they have a right to proceed in equity and that there is no adequate remedy before the Adjustment Board. The trainmen's position, therefore, is that the porters must surrender their right in equity and apply to the Adjustment Board before they may contend that the proceeding before the board is an inadequate remedy.

On the question of prejudice on the part of the board, we quote from Findings of Fact—VII (112)—as follows:

"The First Division of said Railroad Adjustment Board has jurisdiction over disputes between employers and employees (fol. 128) (but not disputes between different groups of employees), involving

> train and yard service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen, and yard service employees. Said board consists of ten members, five of whom are designated by the carriers and five of whom are selected and designated by the national labor organizations of the employees, over which Division 1 is given jurisdiction, including trainmen. The national organization of train porters are all Negroes. No national labor organization of employees, falling within the jurisdiction of the First Division of the Railroad Adjustment Board, will permit a Negro to be a member of any such labor organization, but on the contrary, for many years Negroes have been consistently and (uniformly) excluded from membership therein."

See also pages 519, 484, and 582 of the printed record.

Respondents say that this pertains only to the Adjustment Board and not to the Mediation Board. That is true, but our submission is that it is a complete answer to respondents' contention that the porters had an adequate remedy before the Adjustment Board, which contention was sustained by the court of appeals. The fact that the porters do not have an adequate remedy before the Mediation Board is based upon other and different considerations. See page 35 of petitioners' brief in support of application.

A prejudiced Adjustment Board in the Steele case was one of the grounds for the Supreme Court holding that the plaintiff did not have an adequate remedy before the board (323 U. S., l. c. 206). The court said:

> "Further, since Section 3, First (c) permits the national labor organizations chosen by the majority of the crafts to 'prescribe the rules under which the labor members of the Adjustment Board shall be

selected' and to 'select such members amd designate the division on which each member shalll serve,' the Negro fireman would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made." *Steele* v. *Railway,* 323 U. S., l. c. 206.

To hold that the porters have an adequate remedy before the Adjustment Board is contrary to precedent and to law, and is in violation of fundamental principles of justice.

IV.

We re-emphasize that this is a case peculiarly calling for the issuance of the writ of certiorari.

The case involves the construction of an extremely important statute of the United States concerning which there is confusion, if not direct conflict,, among the decisions. Confusion in decisions as to the meaning of important statutes is a fruitful source of certiorari. This situation cries for a decision by the supreme court in clear and unmistakable language as to the meaning and effect of the act in some of its most important aspects. The question deals with vital transportation and prevention of interruptions therein.

The petition for certiorari by the carriers emphasizes the necessity for a clarifying decision by the Supreme Court. If the Adjustment Board has jurisdiction, as contended by the trainmen, then the carrier is subject to two independent proceedings. One before Division One by the trainmen and a simultaneous proceeding before Division Four by the porters. It is conceivable that the two divisions will conflict and it is possible that Division One would decide in favor of the trainmen and Division Four decide in favor of the porters. The carrier may not, under

the act, have a judicial review of either or both such decisions. Such judicial review is solely for the employee and not for the employer. There are decisions which, it is claimed, hold that the Adjustment Board does have such jurisdiction and there are others that hold it does not. We hold no brief for the carriers. We submit, however, the position in which the carriers will be left if the decision of the court of appeals is to stand is a powerful argument in favor of the Supreme Court clarifying the situation by certiorari.

The Norris-LaGuardia Act does not apply.

The Act does not prohibit injunction except under certain conditions. Absent such conditions the court may issue injunction in a labor case (*Interstate Ass'n* v. *Pauly*, 118 F. (2d) 615).

The provision concerning inability or refusal of local officials to preserve order manifestly is not applicable. The provision (Sec. 108) requiring "*reasonable* effort to settle" is not applicable because such effort would have been futile and "the law will not force anyone to do a thing vain and fruitless." Broom, Legal Maxims, Eighth Edition 210; 36 C. J. 1048; *Donnelly Garment Co.* v. *International*, 99 Fed. (2d) 309.

Without notice to, or knowledge of, the porters, the trainmen served a ten-day ultimatum on the carriers (Ex. M., Tr. 239-41). The carriers were about to throw the porters to the wolves. There was no time even to give notice of application for restraining order (Tr. 16).

The court "on testimony under oath," on application for restraining order found and decreed:

> "The court doth find that unless a temporary restraining order shall be issued herein without notice, a

substantial and irreparable injury to complainants' property will be unavoidable, and the court doth find upon said verified complaint, affidavits in support thereof, and testimony under oath that plaintiffs are entitled to a temporary restraining order without notice" (Tr. 16).

Manfestly, a requirement that the porters should use the few precious days left them trying to settle would be, not "a reasonable," but an unreasonable requirement.

Respectfully submitted,

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APPENDIX.

Findings of Fact by the District Court.

I.

Wherever in these findings there occurs the expression "Disputed Work" or "Services in Controversy," it is intended thereby to mean the six classes of service specified in the letter by E. E. Bryan, general chairman of the Brotherhood of Railroad Trainmen, M-K-T Lines, to O. W. Campbell, assistant manager of said lines, dated April 1, 1946, which is Exhibit M to the stipulation of facts, which classes of service are as follows:

1. Inspect cars and trains and test signal and brake apparatus for the safety of train movements, as per carrier's rules.
2. Use hand and lamp signals for the protection and movement of trains and engines, including the necessary flag protection on the head end of trains, or through block.
3. Open and close switches and derails for switching and for the movement of trains and engines en route; around Wyes; and at some terminals.
4. Couple and uncouple cars and engines and the hose and chain attachments thereof, both en route and at some passenger terminals.
5. Pick up, set out, place, and switch loaded and occupied passenger cars en route and at some passenger terminals.
6. Read the conductor's train orders and familiarize himself with them to determine where opposing trains are to be met or passed, and observe position of all train order signals and see that train orders affecting the movement of trains are picked up en route.

The expression "trainmen" means Brotherhood of Railroad Trainmen, and members thereof who are employed by defendant carriers, and "train porters" means Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants, and members thereof who are likewise employed by such carrier.

By the expression "defendant carriers" is meant, Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas.

II.

For more than 40 years on the system of defendant carriers, train porters pursuant to custom and contract be-
(fol. 125) tween them and the carriers have consistently and without interruption performed all six classes of service and duties herein called Services in Controversy.

III.

For a long time prior to March, 1921, the train porters, pursuant to long, uniform, uninterrupted and mutally understood and agreed upon custom, had performed, on the system of defendant carriers, all six classes of services and duties herein called Services in Controversy. In March, 1921, the individual train porters entered into individual contracts with the then receiver of defendant carriers, which contracts expressly provided that train porters should perform all said services; (Pltf's Ex. #.....).

On July 1, 1921, the parties (train porters and the defendant carriers) entered into a further written contract which expressly provided, "Train porter, when on duty, will be under the jurisdiction of the conductor and will perform such duties as may be required." On December 1, 1928, the said parties entered into a further written contract containing the same express provision. This latter contract has without interruption continued in operation

until the present day. The actual performance of duties by the train porters, including the Services in Controversy, was in no respect changed after any or all said written contracts were entered into, but on the contrary, train porters continued to perform the same duties in the same manner to the present date as they had performed long prior to the first written contract in March, 1921.

IV.

Prior to 1946 and particularly prior to Mr. Bryan's letter to Mr. Campbell dated April 1, 1946 (Ex. M), the trainmen of defendant carriers over a long period of time, being fully cognizant, acquiesced in, or at least did not protest against, performance by the train porters of the Services in Controversy. The several complaints by individual trainmen introduced in evidence did not amount to a general protest by the trainmen against performance by train porters of said services. These complaints consisted of a letter by Mr. Lewis to Mr. Williams dated September 21, 1919; complaints by three individual trainmen to the [fol. 126] United States Labor Board decided April 9, 1924; and the complaint of yardman Shannon decided June 26, 1941. The complaints to the Labor Board were not against trainmen being permitted to perform the Services in Controversy but were complaints of given trainmen in given instances being excluded from such service. The complaint of yardman Shannon was that on a given instance, a train porter had performed the duties of an engineer or yardman in the actual operation of an engine in the yard, a service not included in the Services in Controversy. These complaints neither individually nor collectively are, in light of the entire record, sufficient to prove that the trainmen did not acquiesce generally in the performance by train porters of the Services in Controversy.

V.

The Court finds the fact to be that neither the Brotherhood of Railroad Trainmen nor the members thereof have now, nor as far as the evidence shows, ever have had a contract written or oral with defendant carriers giving to the trainmen the exclusive right to perform all or any of the Services herein called Services in Controversy. Nor have the trainmen any such exclusive right based upon custom or practice on the system of defendant carriers. The custom and practice for at least 40 years has been directly to the contrary.

VI.

On the question of duress, fraud, undue influence and unlawful pressure, by the trainmen against defendant carriers to induce the carriers to terminate their contract with the train porters and to abrogate and abolish the custom and practice of train porters performing the Services in Controversy, the Court finds the facts to be:

Early in 1946 the trainmen, acting through Mr. E. E. Bryan, thereunto authorized by the trainmen, threatened to the carriers that unless within ten days thereafter the carriers took away from the train porters, and gave to the trainmen, the performance of all of the services by the porters, herein called Services in Controversy, then in each instance where a train porter performed any act falling within the Services in Controversy, a trainman would file [fol. 127] a claim against the carriers for a full day's pay as trainman on the run in question, even though another trainman had served upon and been paid for such run, and even though the act performed by the train porter was but a single act such as throwing a switch.

Over six hundred of such claims were actually filed by the trainmen prior to the issuance of the restraining order herein. Mr. Bryan, on the witness stand, stated that if not prevented by injunctive orders the trainmen would file and continue to file such claims in every instance where any train porter on any passenger run performed even a single act of the Services in Controversy, until the carriers took all work falling within the Services in Controversy away from the train porters and gave it to the trainmen. The evidence shows that up until the present time the amount of such claims, figured upon the basis hereinbefore stated, would amount to more than $150,000.

At a conference between Mr. Bryan and Mr. Campbell, and in connection with the demands being made by the trainmen, Mr. Bryan called attention to the fact that on the Frisco system the trainmen had taken a strike vote because that road had refused to take similar work away from their train porters and give it to their trainmen, and also because that road had refused to pay claims similar to the claims of the trainmen then being made against defendant carriers.

At that time and place Mr. Bryan further called attention of Mr. Campbell to the alleged fact that under similar circumstances the Railroad Adjustment Board and Division 1 thereof had allowed such claims in the case of other railroads on account of train porters being permitted on such roads to perform similar services.

VII.

The trainmen have threatened, unless enjoined, to bring before Division 1 of the National Railroad Adjustment Board, all of the claims made and to be made by the trainmen on account of train porters performing any act of the Services in Controversy, which claims have been estimated to this time to amount to approximately $150,000.00.

VIII.

Mr. O. W. Campbell, Assistant Manager of defendant carriers, in explanation to authorized representatives of the train porters as to why the carriers were submitting to the demands of the trainmen and [conceling] the contract with the train porters, stated, and the Court finds the fact to be, that the services of the train porters had been entirely satisfactory throughout the years; that the carriers had been entirely content with the contract between the train porters and the carriers and the company desire to continue such contract indefinitely, and would do so if it were not for the pressure being brought on the carriers by the trainmen; that the Brotherhood of Railroad Trainmen was a powerful economic factor and the carriers could not financially stand a controversy with them in the premises, particularly in respect to the claims by the trainmen filed and threatened to be filed, for [anormous] amounts before the Railroad Adjustment Board, especially in light of certain decisions by the Board against other carriers; that the situation was pathetic but that the carriers were powerless to do otherwise.

IX.

The trainmen are not parties to the contract between the train porters and the carriers and have neither right or obligation thereunder.

[fol. 129]

X.

If the plaintiffs are not afforded injunctive relief as prayed the train porters will suffer immediate and irreparable damage on account of which they have no adequate remedy at law. Some, but not all, specifications of such damages are:

Many of the porters, including some who have served for as much as forty years, will lose their jobs;

Those remaining in the service will have their hours of service increased and rates of pay materially lowered;

They will have their pension rights reduced;

Their seniority rights will be impaired;

They will no longer be subject to the limitations of the 16-hour Continuous Service Law (Title 45 U.S.C.A. Sec. 62).

Declaration of Law Made by the District Court.

I.

Defendants have maliciously, that is in the sense of doing a wrongful act without lawful justification or excuse, sought to induce, and but for the restraining order herein, would have induced the defendant carriers to terminate their contract with the train porters, and to take from the train porters the performance of the Services in Controversy when both parties to such contract and custom were content therewith and desired to continue the same indefinitely and would have so continued the same had it not been for the wrongful acts of the defendants described and specified in the Findings of Fact. The Court declares the law to be that such conduct is inequitable, oppressive and unlawful, and such conduct, irreparable injury being present and adequate remedy at law being absent, should be and will be enjoined.

II.

Plaintiff's petition states, and the evidence establishes, a cause of action at common law, which is not depended on, nor is it limited by the provisions of the Railway Labor Act.

[fol. 130] III.

The Court declares the law to be that the acts and conduct of the defendants as recited in the Findings of Fact, constitute fraud and duress and are a common law tort, on account of which plaintiffs are entitled to injunctive relief.

IV.

In the construction of the written contracts, particularly the contract of December 1, 1928, between the train porters and the defendant carriers, it is the duty of the court to take into consideration, and give due weight to, the prior contractual relationship of the parties and any uniform and uninterrupted practice and custom of the parties in relation to the subject matter of the contract; and to consider and give due weight to the practical and day-to-day construction that the parties put upon the contract after the same was entered into. The principle of law was expressed by Lord Eldon.

> "Tell me what you have done under the contract and I will tell you what the contract means."

Considering the express terms of the contract and giving proper weight to the foregoing principles and other judicial canons of construction, the court finds that the Services in Controversy, fall within the provision of the contract of December 1, 1928,

> "Train porters when on duty, will be under the jurisdiction of the conductor and will perform such duties as may be required,"

and that said contract embraces the Services in Controversy.

V.

This is a typical and proper class action, both as regards plaintiffs and defendants as defined under Federal Rules of Civil Procedure, and particularly Rule 23.

VI.

The jurisdiction of this Court is based alone upon diversity of citizenship. It is not invoked or based upon any contention by plaintiffs, nor does plaintiffs' petition [diesclose], that it is a suit arising under the Laws and Constitution of the United States.